SAHARI BASRI & ANOR A

v.

KERAJAAN NEGERI SELANGOR & ORS

HIGH COURT MALAYA, SHAH ALAM B
HASHIM HAMZAH JC
[CIVIL SUIT NO: 21NCVC-161-09-2012]
4 FEBRUARY 2013

CIVIL PROCEDURE: *Writ of summons - Striking out - Whether plaintiffs' claims disclosed reasonable cause of action against defendants - Whether issues raised involved determination of questions of fact and law to be decided at trial - Whether court at threshold stage considered only pleadings and not extrinsic matters - Whether plaintiffs' claims not without basis as to warrant striking out of action* C D

During the 2008 Malaysian General Election campaign, the coalition of Parti Islam SeMalaysia ("PAS") and Parti Keadilan Rakyat ("PKR"), had given an undertaking in their election manifesto that if they formed the state government of Selangor, domestic water users in Selangor would not have to pay for the first 20 cubic metres of water consumed. Following the coalition's victory in forming the state government, the first defendant implemented the 'Free Water Scheme' ('the scheme') which initially benefited only consumers with individual water meters. It was only two years later that the scheme extended to cover users who received their supply from bulk water meters. In the instant action, the plaintiffs claimed they had been unfairly excluded from the scheme and sought, *inter alia,* (i) a declaration that the scheme applied equally to all domestic water users residing in Selangor, including the plaintiffs, whether they used individual or bulk water meters; and (ii) a mandatory injunction that the third defendant, which held the water concession in Selangor, comply with the undertaking given in the election manifesto. The first and second defendants and the third defendant separately applied to strike out the plaintiffs' action on the common ground that it failed to disclose a reasonable cause of action against them. In addition, the first and second defendants contended that (i) the plaintiffs' mode of bringing the action by way of writ was wrong as the subject-matter of the suit involved public law; hence proceedings should have been brought by way of judicial review under O. 53 of the Rules of Court 2012; (ii) promises made in an election manifesto were not intended to create binding legal relations and E F G H I

was therefore non-justiciable, the remedy to the disaffected party being in the political arena; (iii) the plaintiffs had failed to clarify whether the plaintiffs were indeed residents of Selangor who qualified for the scheme. This was because the pleadings did not state the addresses of the plaintiffs, apart from the first plaintiff's, and the identity card numbers of many of the plaintiffs were also not stated. There was hence a failure to identify the class of persons the plaintiffs actually represented. The third defendant, meanwhile, contended, *inter alia,* that (i) it did not owe any duty to the plaintiffs as they individually did not have water supply accounts, and hence there was no contractual relationship with the third defendant; (ii) it was under no obligation to ensure the plaintiffs benefited under the scheme; and (iii) the plaintiffs did not have any *locus standi* to pursue the claim against the third defendant.

Held (dismissing defendants' applications with costs):

(1) The claim in the present case was under private law though concerning a public authority. Therefore, to commence such an action under O. 53 of the Rules of Court was not suitable in the present case. (para 27)

(2) The issue whether matters stipulated in the election manifesto were legally binding and enforceable involved the determination of questions of fact and law which ought to be decided at trial. It was premature to strike out the writ when there were triable issues. (para 31)

(3) The exact identity of the persons represented as the plaintiffs was neither critical nor imperative and could not be the sole basis for the court to strike out the writ. Any objections could be raised at the trial. The absence or ambiguity as such was not an impediment to commence a representative action so long as the plaintiffs were a class of persons with a common interest and a common grievance. (para 34)

(4) The class of persons was properly defined and specifically pleaded because the endorsement on the writ and statement of claim inclusive of Lampiran A made clear reference to the 711 domestic water consumers residing in Selangor including the first plaintiff. On the issue that the defendants were prejudiced as they were unable to determine if the plaintiffs were indeed residents of Selangor who qualified under the scheme, this was an issue to be decided at trial. (paras 41 & 43)

(5) The averments by the plaintiffs against the third defendant and the latter's replies thereto raised questions of facts which required appreciation of evidence. The substantive factual dispute regarding the issue of contractual relationship could only be determined in a proper trial. At the threshold stage, the court only considered the pleadings and not extrinsic matters. The plaintiffs' claim was not without basis regardless of whether they might or might not succeed at the trial. (paras 48 & 55)

Case(s) referred to:

A v. Secretary of State for the Home Department [2005] 3 All ER 169 ***(refd)***

Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors [2000] 2 CLJ 457 CA ***(refd)***

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(dist)***

Awang Ismail & Ors v. Kerajaan Negeri Kedah & Ors [2010] 3 CLJ 962 HC ***(refd)***

Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Dato' Seri Anwar Ibrahim v. Perdana Menteri Malaysia & Anor [2007] 3 CLJ 377 CA ***(refd)***

Department of Education and Employment, ex parte Begbie [1983] 1 WLR 1115 ***(refd)***

Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia [2013] 2 CLJ 1009 FC ***(refd)***

Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd [2011] 1 CLJ 285 CA ***(refd)***

Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors & Other Appeals [1997] 4 CLJ 253 CA ***(refd)***

Markt & Co, Limited v. Knight Steamship Company, Limited; Sale & Frazar v. Knight Steamship Company, Limited [1910] 2 KB 1021 ***(dist)***

Merdeka University Berhad v. Government of Malaysia [1982] 1 LNS 1 FC ***(refd)***

O'Reilly v. Mackman [1982] 3 All ER 1124 ***(refd)***

Ong Boon Hua @ Chin Peng & Anor v. Kerajaan Malaysia [2010] 3 CLJ 125 HC ***(refd)***

Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716 FC ***(refd)***

QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor [2006] 2 CLJ 532 CA ***(refd)***

Schmidt v. Secretary of State of Home Affairs [1969] 2 WLR 337 ***(refd)***

A *Shahidan Shafie v. Atlan Holdings Bhd & Anor & Other Appeals [2005] 3 CLJ 793 CA* ***(refd)***

Vellasamy Pennusamy & Ors v. Gurbachan Singh Bagawan Singh & Ors [2012] 2 CLJ 712 CA ***(refd)***

YAB Dato' Dr Zambry Abd Kadir & Ors v. YB Sivakumar Varatharaju Naidu; Attorney-General Malaysia (Intervener) [2009] 4 CLJ 253 FC ***(refd)***

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Legislation referred to:

Courts of Judicature Act 1964, s. 25(2)

Federal Constitution, arts. 80, 160

C Laws of the Constitution of Selangor 1959, art. 50

Rules of Court 2012, O. 6, O. 15, O. 18 r. 19(1)(a), (b), (c), (d), O. 53 r. 1

Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (c), (d), O. 53

For the plaintiffs - Walter Pereira (Geetha Thanigasalam & Izyan Darlina

D *with him); M/s Kamarudin & Partners*

For the 1st & 2nd defendants - Edmund Bon Tai Soon (Chan Yen Hui with him); M/s Chooi & Co

For the 3rd defendant - Mark Lau (Tan Cheng Leong with him); M/s Sreenevasan Young

E *Reported by Ashok Kumar*

JUDGMENT

F **Hashim Hamzah JC:**

Introduction

[1] This is an application by the defendants to strike out the writ action filed by the plaintiffs on 11 September 2012.

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[2] The first and second defendant applied to strike out by virtue of O. 18 r. 19(1)(a) of the Rules of Court 2012 ("encl. 14").

H **[3]** The grounds of the application are as follows:

(1) That the plaintiff's suit discloses no reasonable cause of action as it was filed in contravention of O. 53 of the Rules of Court 2012;

I (2) That the implementation of promises made in an election manifesto is a matter of policy that is non-justiciable;

(3) That the plaintiffs failed to plead relevant details in pursuant to O. 6 read together with O. 15 of the Rules of Court 2012 and therefore failed to raise reasonable cause of action; and

(4) That the plaintiff's case is obviously unsustainable warranting a summary procedure of striking out.

[4] The third defendant applied to strike out the writ in pursuant to O. 18 r. 19(1)(a), (b), (c) and/or (d) of the Rules of Court 2012 ("encl. 11").

[5] The grounds of the application are as follows:

(1) That the plaintiffs' writ and statement of claim discloses no reasonable cause of action.

(2) That the plaintiffs' writ and statement of claim is scandalous, frivolous or vexatious or may prejudice and embarrass the fair trial of the action or is otherwise an abuse of the process of the court because:

(a) The third defendant is under no obligation to ensure that the plaintiffs receive water subsidy benefits under the Free Water Scheme or at all;

(b) The third defendant does not owe any duty as alleged in the statement of claim or at all to the plaintiffs who appear to be connected to a bulk water meter and do not have water supply accounts with the third defendant;

(c) There is no contractual and/or any legal relationship between the plaintiffs and the third defendant;

(d) The third defendant was not obliged and/or directed by the first defendant to change the water meters of the plaintiffs by the 'Program Penukaran Meter Individu' or Water Meter Migration Programme, or failed and/or is guilty as alleged or any negligence as alleged; and

(e) The plaintiffs do not have the *locus standi* to pursue any claim against the third defendant as alleged in the statement of claim.

Brief Facts

[6] In the midst of a political campaign during the election in 2008, a manifesto was given to the public by the coalition of both Parti Islam SeMalaysia ("PAS") and Parti Keadilan Rakyat ("PKR") which includes and in particular an offer that if they are voted by the majority to be the Government of Selangor, they will provide free water usage for the first 20m³ to the domestic water users of Selangor. The coalition won by majority after the said election.

[7] In early June 2008, the first defendant implemented the 'Free Water Scheme' whereby the first and second defendant will pay the actual cost of water for the first 20m³ per month from the water bills of the residents in the State of Selangor. This was done in view of fulfilling the promises made in the election manifesto prior to the election held in 2008.

[8] The Free Water Scheme applied initially to domestic water consumers in the State of Selangor (excluding the Federal Territory of Kuala Lumpur and Putrajaya) using individual water meters under Tariff Code 10 of the Selangor Water Supply Enactment 1997 ("the said Enactment"). At the gazette tariff rate of RM0.57 per cubic meter, the subsidy amounted to RM11.40 a month for one individual meter.

[9] Only on 13 October 2010 by a letter dated the same between the first defendant and the third defendant, the first defendant decided to extend the Free Water Scheme to domestic water consumers who are using bulk water meters in apartments and flats under Tariff Code 18 of the said Enactment. The first defendant decided to extend its implementation and to backdate it to 1 June 2010.

[10] The plaintiffs in this case claimed that they never received any deductions for the first 20m³ in their water bills as promised. On 11 September 2012 the plaintiffs therefore filed the writ of summons and the statement of claim against the defendants. The plaintiffs prayed for:

(1) a declaration that the Free Water Scheme applies to all domestic water users residing in Selangor including the plaintiffs regardless of whether they are using individual or bulk water meters;

(2) an order for a mandatory injunction against the third defendant to issue water bills with rebates or deductions as promised to the plaintiffs;

(3) a total sum of RM405,270 being the total amount of damages to be paid by the first and/or third defendant to the plaintiffs or alternatively damages for 36 months prior to the date the action was filed; and

(4) interest at the rate of 4% from the date of filing until full satisfaction of the amount of damages.

[11] The defendants then applied to strike out the plaintiffs' action.

Law On Striking Out

[12] Order 18 r. 19(1)(a), (b), (c) and (d) of RHC 1980 provides that:

> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:
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> (a) it discloses no reasonable cause of action or defence as the case may be;
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> (b) it is scandalous, frivolous or vexatious;
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> (c) it may prejudice, embarrass or delay the fair trial of the action;
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> (d) it is otherwise an abuse of the process of the Court, and may order for the action to be stayed or dismissed or judgment to be entered accordingly as the case may be.

[13] With regard to the principles underlying the applicability of the said provision, Mohd Dzaiddin Abdullah SCJ (as he then was) in delivering the judgment of the Supreme Court in the case of *Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 at p. 11; [1993] 2 AMR 1969 at pp. 1975 and 1976, held that:

> The principles upon which the court acts in exercising its power under any of the four limbs of Order 18 r. 19(1) RHC are well settled. It is only in plain and obvious cases that recourse should

A be had to the summary process under this Rule (per Lindley MR in *Hubbuck v. Wilkinson*) (1899) 1 QB 86, p. 91, and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable" (*Att Gen of Duchy of Lancaster v. L & NW Ry Co* (1892) 3 Ch 274, CA). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v. Moloney* (1965) 1 WLR 1238; (1965) 2 All ER 871, CA. The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under Order 33 r. 3 (which is in *pari materia* with our Order 33 r. 2 RHC) (*Hubbuck v. Wilkinson*) (*supra*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable … But what we have to consider is whether the counterclaim discloses some cause of action and, likewise, whether the defence to counterclaim raises a reasonable defence. It has been said that so long as the pleadings disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out (*Moore v. Lawson* (1915) 31 TLR 418 CA; *Wenlock v. Moloney* (*supra*).

[14] These principles were also affirmed in the Federal Court case of *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716; [1996] 2 AMR 2477 at p. 2509 (AMR).

[15] Since the application to strike out by the first and second defendant was made under limb (1)(a) of O. 18 r. 19 of the Rules of Court 2012, the court is only entitled to consider the statement of claim on the face of it and cannot consider any evidence in the form of affidavits. This can be seen in the Court of Appeal case of *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2000] 2 CLJ 457 at p. 465; [2000] 2 AMR 1319 at p. 1328 which affirmed both of the cases abovementioned, where Mokhtar Sidin JCA (as he then was) held that:

> In considering an application under Order 18 r. 19(1)(a), the court has to take into account the statement of claim on the face of it and no consideration whatsoever shall be paid to the evidence in the form of these affidavits. So long as the statement of claim discloses a reasonable cause of action, however weak the claim is, the claim cannot be struck off summarily. At that stage of the

proceedings it is not for us or for the learned Judge of the High Court to consider the merits of Carah's claim. On an application under Order 18 r. 19(1)(a) the court has only to consider whether the statement of claim discloses a reasonable cause of action. The well-established principle is that the court will not summarily strike out pleadings, except only in plain and obvious cases where the claim or counterclaim is plainly and obviously not sustainable.

[16] However, with regard to the application to strike out by the third defendant which was made in pursuant to limb (a), (b), (c) and/or (d) of O. 18 r. 19(1) of the Rules of Court 2012, the court is entitled to examine affidavit evidence (see *Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd* [2011] 1 CLJ 285 at p. 296-297; [2011] 2 MLJ 192 at p. 200).

Application To Strike Out By The First And Second Defendants

The Plaintiff's Suit Discloses No Reasonable Cause Of Action As It Was Filed In Contravention Of O. 53 Of The Rules Of Court 2012

[17] The learned counsel for the first and the second defendants argued extensively on this issue. It was submitted that the claim under this suit was allegedly founded on the action or omission of the first and second defendants in exercising their public duties or functions. It was further submitted that the issue falls under the domain of public law and therefore O. 53 of the Rules of Court 2012 should be resorted to. It was contended by the plaintiffs that since the prayers sought for by the plaintiffs are in the form of a declaration, the mode of commencement by way of writ is therefore good in law.

[18] With regard to the applicability of O. 53, O. 53 r. 1 of the Rules of Court 2012 provides that:

Application for judicial review (O. 53, r. 1)

1. (1) This Order shall govern all applications seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and for the purposes therein specified.

(2) This Order is subject to the provisions of Chapter VIII of Part 2 of the Specific Relief Act 1950 [Act 137].

[19] It is also necessary to consider para. 1 of the Schedule to the Courts of Judicature Act 1964 under s. 25(2) which provides that:

> Prerogative writs
>
> Power to issue to any person or authority directions, orders or writs, including writs of the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

[20] There is no mention of declaratory reliefs under the said section but the Federal Court recently held that the term 'any others' includes a prayer for declaration. See *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865; [2010] 3 MLJ 145 FC.

[21] The learned counsel for the first and second defendants relied on the said Federal Court decision of *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* (*supra*) where it was held at p. 897 para. 61 (CLJ); p. 172 para. 60 (MLJ) that:

> However, O. 53 of the RHC sets out a specific procedure for an aggrieved party seeking relief, including a declaration, against a public authority on his infringed right to which he was entitled to protection under public law to follow. It is our view that when such an explicit procedure is created to cater for this purpose, then as a general rule all such application for such relief must commence according to what is set down in O. 53 of the RHC otherwise it would be liable to be struck off for abusing the process of the court.

[22] In addition, with regard to the principles in which the court must consider in this matter, it was also held in the same case at pp. 897-898 para. 62 (CLJ); p. 172 para. 61 (MLJ) that:

> We observed that a challenge on the use of appropriate procedure is very much fact based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O. 53 of the RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has substantial public law element then the procedure under O. 53 of the RHC must be adopted. Otherwise it may be set aside on ground that it

abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under O. 53 of the RHC is not suitable.

[23] The principle is also substantially the same in the recent Federal Court case of *Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia* [2013] 2 CLJ 1009, Rayuan Sivil No: 01-9-04/2012(W) referred to by the defendants where it was held that the court will be slow in interfering into the realm of the executive especially in matters regarding policies which are always nonlegal except when the policy or action is inconsistent with the constitution or any law or arbitrary or irrational or otherwise an abuse of power. See also *O'Reilly v. Mackman* [1982] 3 All ER 1124 and *YAB Dato' Dr Zambry Abd Kadir & Ors v. YB Sivakumar Varatharaju Naidu; Attorney-General Malaysia (Intervener)* [2009] 4 CLJ 253; [2009] 4 MLJ 24 FC.

[24] Therefore, in short, the court must consider whether there is a substantive public law element in the dispute. If there is a mixture of private and public law, the court must consider which one is more predominant than the other. If the public law element is more predominant, the action must begin by way of judicial review and *vice versa*. In determining the issue on whether the issue is founded either in the domain of public law, it is necessary to consider that there must be a decision being challenged, the decision is made by a member of the administration, the decision must be made in exercising his public duties, the implication of the decision will affect the public as a whole, the public law is only concerned with the decision making process; and that the legal sources that are being impugned are in the public domain. (see *Dato' Seri Anwar Ibrahim v. Perdana Menteri Malaysia & Anor* [2007] 3 CLJ 377 at p. 397-398; [2007] 4 MLJ 422 at p. 436).

[25] However I find that the facts in the present case and the facts in *Ahmad Jefri*'s case are distinguishable. In *Ahmad Jefri*, the appellant who was a government officer absented himself from work following a dispute with his superiors. The appellant had been dismissed from service *vide* gazette notification. As a result, the appellant filed a writ of summons and statement of claim against the respondents seeking, *inter alia*, a declaration that his dismissal was null and void, and damages for wrongful dismissal.

[26] It was held that not every decision made by an authoritative body is suitable for judicial review. There must be sufficient public law elements in the decision making process. In particular to the facts in *Ahmad Jefri*, it was held that there were clearly elements of public law present. The appellant was a public officer subject to the Public Officers (Conduct and Discipline) Regulations 1993. He had been dismissed under the said regulation which is a statutory law, by a body which had acted within the scope of such statutory power. Although the decision to dismiss the appellant involved the dismissal of an employee by an employer, just like a master dismissing his servant, which constituted a private law matter, the fact that there were statutory conditions and restrictions imposed by the regulations on the conduct and dismissal of the appellant shows the substantiality of the public law element. Thus it was held that such action was suitable for a judicial review.

[27] On the contrary, upon careful perusal of all the necessary documents in the present case, I find that there is a mixture of claim under both the domain of public and private law and that the latter is more predominant than the former. I agree with the submission by the learned counsel for the first and second defendant that the first and second defendants were sued in their capacity as public authorities by virtue of art. 160 of the Federal Constitution and the decision in the Supreme Court case of *Merdeka University Berhad v. Government of Malaysia* [1982] 1 LNS 1; [1982] 2 MLJ 243 at p. 250 (MLJ). However, the prayer for a declaration sought for by the plaintiffs is more towards the issue on the validity and enforceability of the matters promised in the election manifestos in which the implementation of the Free Water Scheme does not affect the plaintiffs as promised in the manifestos. The cause of action pleaded in the statement of claim is primarily on the law of contract, which is under the domain of private law. I find no assistance in the submission by the learned counsel for the first and second defendants that the legal source of the powers that are being impugned is found in the public domain based on art. 50 of the Laws of the Constitution of Selangor 1959 and art. 80 of the Federal Constitution. I find that both these provisions are too general and do not support the first and second defendants' contention that the legal source of power is related to the decision making process which should be challenged by way of judicial review. Therefore, I believe that in

the present case, the claim is under private law though concerning a public authority. Therefore, the mode to commence such action under O. 53 of the RHC is not suitable in the present case. As such, I am unable to agree with this ground submitted by the first and second defendants.

Whether The Implementation Of Promises Made In An Election Manifesto Are Matters Of Policies That Are Non-Justiciable

[28] It is submitted by the learned counsel for the first and second defendant that the matters in the manifesto do not create any binding legal arrangement which can be enforced by the courts, rendering them to be non-justiciable. As a result, there is no reasonable cause of action on the part of the plaintiffs against the defendants. It is also submitted that the only remedy against the failure to adhere to any matters in the manifesto is only political and not judicial or legal. (see *Department of Education and Employment, ex parte Begbie* [1983] 1 WLR 1115 at p. 1125). However, the question is whether the issues raised are substantially political or those which the court can decide on especially on issues involving legal questions. (see *A v. Secretary of State for the Home Department* [2005] 3 All ER 169 at p. 190).

[29] On the other hand, the learned counsel for the plaintiffs contended that there was a valid contract between the first and second defendant with the plaintiffs in view of the existence of offer, acceptance and also consideration which are elements of a valid and enforceable contract. It was also contended that there was a legitimate interest on the part of the plaintiffs which entitles them to a fair hearing. (see *Schmidt v. Secretary of State of Home Affairs* [1969] 2 WLR 337).

[30] It is trite law that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument and so long as the pleadings disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial cannot be a ground for the pleadings to be struck out. (see *Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd* (*supra*)).

[31] I am of the view that the main issue in the present case which is whether any matters stipulated in election manifestos are legally binding and enforceable involves the determination of question of facts and question of law which ought to be decided

in a proper trial. This issue requires appreciation of evidence and legal interpretation of law respectively. It is too premature to strike out the writ when there are some triable issues to be decided by a judge.

Whether The Failure On The Part Of The Plaintiffs To Plead Relevant Details In Pursuant To O. 6 Read Together With O. 15 Of The Rules Of Court 2012 Failed To Raise Reasonable Cause Of Action

[32] The learned counsel for the first and second defendant submitted that the plaintiffs failed to plead the following details:

(1) Endorsement of representative capacity in the title of the writ;

(2) Class of person represented was not defined with sufficient clarity;

(3) There was no address stated for plaintiffs no. 2 to 710 being the material facts; and

(4) There was no National Registration Identity Numbers for plaintiffs no. 571 to 710 being the material facts.

[33] With regard to this issue, I find it helpful to quote the passage of Her Lordship Zainun Ali JCA in her dissenting judgment in the Court of Appeal case of *Vellasamy Pennusamy & Ors v. Gurbachan Singh Bagawan Singh & Ors* [2012] 2 CLJ 712 at pp. 773-774 paras. 227 to 229; [2010] 5 MLJ 437 at p. 488 paras. 273 to 275. It was held that:

> [273] The learned trial judge took the position that the exact identity of the persons whom the four named plaintiffs are representing are not critical nor imperative. The absence of these is not an impediment to commencing a representative action so long as they are a class of persons with a common interest and a common grievance.
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> [274] The learned trial judge found that the said representative action of the plaintiffs was properly constituted even if in the event of success, they would be entitled to different measures of relief. In fact the 213 unnamed plaintiffs represented by the four named plaintiffs need not even give their consent, and are not liable to costs (see Sultan Azlan Shah (the FJ) in *Eh Riyid v. Eh Tek* [1976] 1 MLJ 262).
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> [275] I agree with the above finding of the learned trial judge and again, found no reason to intervene.

[34] It is important to note that this is a passage of the dissenting judgment by Her Lordship Zainun Ali JCA which was not disputed or raised as an issue by the other panel of judges. I believe that in applying the principles to the present case, the exact identity of the persons whom the plaintiff is representing is neither critical nor imperative and cannot be the sole basis for the court to strike out the writ. Any objections can be raised during the trial. The absence or ambiguity as such is not an impediment to commence a representative action as long as they are a class of persons with common interest and common grievance.

[35] Based on the facts of the present case, the plaintiffs claimed that all the plaintiffs are domestic water consumers residing in Selangor and are subject to the Free Water Scheme as promised in the election manifesto. The requirement of a common interest is satisfied. It was also claimed that the first and second defendants had failed to implement the Free Water Scheme indiscriminately whereby only those who were using individual water meters had benefited from the implementation of the scheme and not the plaintiffs. The second requirement namely common grievance is also satisfied.

[36] In addition, it was also submitted that there were inconsistencies in the writ and the statement of claim where in the former, the plaintiffs pleaded that they are the 711 residents of Selangor who brought this action against the first and second defendants whereas in the latter, it was pleaded that the first plaintiff represents 710 other plaintiffs as listed in Lampiran A. It was further submitted that due to this contradiction, the plaintiff failed to define with sufficient clarity the class of person represented and that the first and second defendants were prejudiced in a sense that they are unable to determine whether all the plaintiffs are indeed the residents of Selangor who qualify under the Free Water Scheme.

[37] The learned counsel for the plaintiffs only contended that it is inappropriate to name all the 711 plaintiffs in the writ and that Lampiran A shows that all the plaintiffs are suffering common grievance regardless.

[38] The first and second defendants relied on the principles in the case of *Markt & Co, Limited v. Knight Steamship Company, Limited; Sale & Frazar v. Knight Steamship Company, Limited* [1910] 2 KB 1021 and also the case of *Ong Boon Hua @ Chin Peng & Anor v. Kerajaan Malaysia* [2010] 3 CLJ 125; [2010] 2 MLJ 794.

[39] Again I find that this argument is not sustainable. Firstly, in the case of *Markt & Co* it was held that:

> Before discussing the important legal question here raised it is necessary to examine carefully the writs in the two actions. In the one writ the plaintiffs are described as *Markt & Co, Limited*, on behalf of themselves and others owners of cargo lately laden on board the steamship Knight Commander. In the other action the plaintiffs are described exactly in the same way, with the exception that *Sale & Frazar* are substituted for *Markt & Co, Limited*. It will be seen that the description of the classes on behalf of which the respective plaintiffs claim to sue is quite indefinite. The plaintiffs do not purport to sue, nor do they propose or desire to sue, on behalf of all the owners of cargo lately laden on board the ship in question, but only on behalf of some of such owners, and the writ does not specify which.
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> In the first place it is essential in the case of representative actions that the class on behalf of which the relief is sought should be defined in the writ. It is impossible for the Court to give any judgment as to the rights of parties by virtue of their being members of a class without its being defined what constitute membership of the class. A mere list tells the Court nothing, more especially when that list does not appear on the record. If such an action as this could possibly go to trial the case of each firm whose name appears in the list would have to be gone into in order to ascertain the facts relating to it, so that the Court might be able to pronounce whether and why its name should be included in such list. In other words it would not be a representative action at all. If judgment were given upon such a writ as this, no estoppel could arise either for or against the defendants without each case being individually examined into.

[40] The factual situation in the abovementioned case and also in the present case before me is very much distinguishable. In the case of *Markt & Co* the main point that the court considered was that there was never any common interest and common grievance between the plaintiff and those that the plaintiff sought to represent. The claim was for the recovery of damages on the basis of separate and individual bill of lading where the term usually

differs, among others, according to the nature of goods shipped. In these circumstances, by merely stating that the plaintiff is representing itself and 'other owners of cargo lately laden on board the steamship Knight Commander' was held to be insufficient. The main reason being, if the court allows the said action, it will be impractical to call each and every named plaintiffs to prove their individual case.

[41] On the other hand, in the present case, based on all the documents produced before me, I believe that the class of persons is properly defined and specifically pleaded because the endorsement in the writ and the statement of claim inclusive of Lampiran A made clear reference to the 711 domestic water consumers residing in Selangor including plaintiff no. 1.

[42] The factual situation in *Ong Boon Hua* is also distinguishable from the present case due to the fact that the cause of action of the plaintiff is based on the law of defamation and representative action can never be brought in defamation proceedings. In addition, there was no mention at all on who the other 'related parties' are. It was held that at pp. 134 and 135 (CLJ); pp. 804 and 805 (MLJ) that:

> [23] The plaintiffs' pleading indicate that the first plaintiff is suing in his personal capacity as well as a representative of all members of the Parti Komunis Malaya and all the other relevant parties. It is unclear who these 'other relevant parties' are. This is an unknown party. He is also suing in his capacity as the secretary general of the Parti Komunis Malaya.
>
> [24] The plaintiffs' pleading indicate that the first plaintiff is suing in his personal capacity as well as a representative of all members of the Parti Komunis Malaya and all the other relevant parties. It is unclear who these 'other relevant parties' are. This is an unknown party. He is also suing in his capacity as the secretary general of the Parti Komunis Malaya.
>
> [25] Lord Atkin in the House of Lords' case of *Knupffer v. London Express Newspaper Ltd* [1944] AC 116 at p. 122 remarked:
>
> > The reason why a libel published of a large or indeterminate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was, in fact,

> included in the defamatory statement, for the habit of making unfounded generalisations is ingrained in ill-educated or vulgar minds, or the words are occasionally intended to be a facetious exaggeration. Even in such cases words may be used which enable the plaintiff to prove that the words complained of were intended to be published of each member of the group, or at any rate, of himself.

[26] In *Atip bin Ali v. Josephine Doris Nunis & Anor* [1987] 1 MLJ 82, Wan Yahya J after quoting *Knupffer v. London Express Newspaper Ltd* stated:

> Lastly, I am of the view that representative proceedings cannot be taken in defamation proceedings. No representative action is normally allowed to establish the right of numerous person to recover damages as the sole relief claimed. In a defamation suit the ground of liability for damages must necessarily differ from one person to another.

[27] In the said case, His Lordship also referred to *Daya v. Param Sukh* (1888) ILR 11 All 104 and *Brahmanna v. Ramakrishnama* (1894) ILR 18 Madras 250. Defamation involves a right *in personam* and close relationship with the person defamed alone will not give rise to the right on the part of other persons to sue the defendant.

[28] The first plaintiff's attempt of bringing this action as a representative of all members of the Parti Komunis Malaya and all other relevant parties is therefore misconceived.

[43] Regarding the issue that the defendants were prejudiced because they are unable to determine whether the plaintiffs are indeed the residents of Selangor who qualify under the scheme, I believe that this is an issue to be decided in a proper trial.

[44] Therefore, based on all the above reasons, I am unable to agree with the submission of the first and second defendants with regard to this issue.

Whether The Plaintiffs' Case Is Obviously Unsustainable Warranting A Summary Procedure Of Striking Out

[45] Based on all the above reasons, I find that the plaintiffs' case is not obviously unsustainable and does not warrant a summary procedure of striking out under O. 18 r. 19(1)(a) of the Rules of Court 2012. Therefore the application by the first and second defendant is hereby dismissed with costs.

Application To Strike Out By The Third Defendant

[46] With regard to the application of striking out by the third defendant, firstly, it was submitted by the learned counsel for the third defendant that:

(a) The third defendant is under no obligation to ensure that the plaintiffs receive water subsidy benefits under the Free Water Scheme or at all;

(b) The third defendant does not owe any duty as alleged in the statement of claim or at all to the plaintiffs who appear to be connected to a bulk water meter and do not have water supply accounts with the third defendant;

(c) The third defendant was not obliged and/or directed by the first defendant to change the water meters of the plaintiffs by the 'Program Penukaran Meter Individu' or Water Meter Migration Programme, or failed and/or is guilty as alleged or any negligence as alleged; and

(d) There is no contractual and/or any legal relationship between the plaintiffs and the third defendant.

[47] The learned counsel for the plaintiffs on the other hand contended that:

(a) the fact that the third defendant holds water concession in Selangor, that it was specifically incorporated as an implementation vehicle of the respective state government in respect to the privatisation of the water supply and distribution systems in Selangor especially, and that failure on the part of the plaintiffs to pay the water bills will result in the third defendant cutting the water supply of the plaintiffs meaning that they are the customers of the third defendant gave rise to a legal and/or contractual relationship;

(b) the third defendant is obliged to ensure that the plaintiffs receive water subsidy as promised in the manifesto indiscriminately;

(c) the third defendant was reluctant and/or negligent in carrying out the directives given by the first and second defendant.

[48] With due respect, I believe that all of the issues above are questions of facts which requires appreciation of evidence. Thus these matters ought to be tried in a proper trial.

[49] Next, the learned counsel for the third defendant submitted that the plaintiffs do not have the *locus standi* to pursue any claim against the third defendant as alleged in the statement of claim.

[50] It is trite law that there are two stages where the court must decide on the issue of whether the plaintiff has a *locus standi* in a given set of circumstances. The first being the 'threshold stage' and the second being the 'merits stage'. During the 'threshold stage', in a private law matter or any claim under the domain of private law, the judge must confine himself to those pleaded in the pleadings and no regards should be given to extrinsic evidence. Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Shahidan Shafie v. Atlan Holdings Bhd & Anor & Other Appeals* [2005] 3 CLJ 793 at p. 802 (CLJ); [2006] 6 AMR 757 at p. 767 (MLJ) held that:

> Before I move to the second issue there is a proposition central to the determination of *locus standi*. It is this. When determining whether a particular plaintiff has *locus standi* in a given set of circumstances the court must consider the action in two stages. At the first stage ("the threshold stage") assume that the fact pattern asserted by the plaintiff is true. It is just like a case of striking out a pleading for want of a cause of action or defence under RHC Order 18 r. 19(1)(a) where the court is confined to the pleading and not to extrinsic matters. It does not matter whether the plaintiff may ultimately fail in his action on the merits. Failure or success must be considered at the second stage ("the merits stage"). If a plaintiff is found to lack standing to sue then his action fails *in limine* at the threshold stage and there is no inquiry into the merits of the given case.

[51] See also *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors & Other Appeals* [1997] 4 CLJ 253; [1997] 3 MLJ 23 and *Awang Ismail & Ors v. Kerajaan Negeri Kedah & Ors* [2010] 3 CLJ 962 at pp. 977-978 (CLJ); [2010] 4 MLJ 83 at p. 100 (MLJ).

[52] In addition, self-interest on the part of the parties in presenting their case is an important factor to consider in determining the issue of *locus standi*. Again, Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532 at pp. 540-541 (CLJ); [2006] 3 MLJ 164 at p. 171 (MLJ) held that:

> [13] It is for the foregoing reason that in *United Engineers (M) Berhad v. Lim Kit Siang* [1988] 2 MLJ 12, Abdul Hamid CJ (Malaya) identified self-interest as an element of the rule of standing to sue for a declaration and injunction in what was essentially a public law action. His Lordship said (at p. 27):
>
> > A justification for standing rules relates to standing as a function of the adversary system. Self-interest is seen as the motivating force that will ensure that the parties present their respective positions in the best possible light. If the motivation of self-interest is non-existent so that the ensuing dispute is not with respect to contested rights and obligations of the parties themselves, then the assurance of diligent preparation and argument cannot exist.
>
> [14] This is entirely in keeping with the principles governing standing to obtain private law remedies in a public law context. It demonstrates the approach to *locus standi* in private law proceedings.

[53] The test for a claim under the domain of public law is more flexible. In quoting the passage of Gopal Sri Ram JCA (as he then was) in the case of *Shahidan Shafie v. Atlan Holdings Bhd & Anor & Other Appeals* (*supra*) at p. 171 and 172 where it was held that:

> There is a single test of threshold *locus standi* for all the remedies that are available under the order. It is that the applicant should be 'adversely affected'. The phrase calls for a flexible approach. It is for the applicant to show that he falls within the factual spectrum that is covered by the words 'adversely affected'. At one end of the spectrum are cases where the particular applicant has an obviously sufficient personal interest in the legality of the action impugned (see *Finlay v. Canada* [1986] 33 DLR 421). This includes cases where the complaint is that a fundamental right such as the right to life or personal liberty or property in the widest sense (see *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261) has been or is being or is about to be infringed. In all such cases, the court must, *ex debitojustitiae*, grant the applicant threshold standing.

[54] In the present case, the learned counsel for the third defendant submitted that the plaintiffs have no *locus standi* in the action since they have no contractual and/or legal relationship or that the plaintiffs are strangers.

[55] However, there is a substantive factual dispute regarding the issue on contractual relationship which can only be determined in a proper trial. At this stage, which is the threshold stage, the court must only consider the pleadings and not extrinsic matters. The plaintiffs who were affected by the discriminatory implementation of the Free Water Scheme as opposed to the promise in the election manifesto has sufficient interest to challenge the matter. In perusing the pleadings by both parties, I find that the claim by the plaintiffs is not without basis, regardless of whether it may or may not succeed in a proper trial.

[56] On these grounds, I find that the third defendant failed to show that the present case against them is obviously unsustainable and warrants a summary procedure of striking out under O. 18 r. 19(1)(a) of the Rules of Court 2012.

Conclusion

[57] Based on all the above principles and upon careful perusal of all the necessary documents and after hearing the submission by all the parties to this suit, I hereby dismiss both the applications (Lampiran 11 and Lampiran 14) by the defendants to strike out the writ action filed by the plaintiffs with costs.